

AK-CHIN INDIAN COMMUNITY

Community Government

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Via Email to: consultation@bia.gov

Lawrence S. Roberts
Acting Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street, NW
MS-3071-MIB
Washington, DC 20240

Re: Indian Affairs Contract Support Costs Policy

Dear Assistant Secretary Roberts,

The Ak-Chin Indian Community has reviewed the draft Indian Affairs Manual chapter entitled Contract Support Costs (hereinafter, the Policy) issued by the Bureau of Indian Affairs (BIA) with your letter dated March 22, 2016. Ak-Chin appreciates the opportunity to review and comment on the Policy and is generally supportive of the approach that BIA has taken. Ak-Chin also has a handful of suggestions for further improvements to the Policy.

General Comments

Ak-Chin joins many other tribes in commending the BIA for the collaborative process that it followed in developing the draft Policy. We understand that the Policy Workgroup functioned in a collegial and efficient manner, and we commend both the federal and tribal representatives who worked on this important document.

Ak-Chin also appreciates that the BIA took to heart Congress's call to simplify and streamline the process of calculating and paying full CSC. The draft Policy is concise and generally easy to understand, in stark contrast to the draft CSC Policy developed by the Indian Health Service (IHS).

Once approved, the Policy should be useful to both BIA and tribal staff in outlining the process that the BIA will use to ensure full and appropriate payment of CSC. Ak-Chin notes, however, that the Policy is not binding on tribes and tribal organizations; it cannot and does not impair any rights conveyed by the Indian Self-Determination and Education Assistance Act (ISDEAA). The courts have confirmed that when it comes to contract support costs, Congress has not delegated to the agency any authority to write regulations or to adopt non-regulatory requirements that are binding upon tribes. *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (interpreting 25 U.S.C. § 450k(a)(1)).

Before turning to Ak-Chin's specific comments on the Policy, we generally note that the Policy should clearly state that every provision of the Act and of every contract, compact, and funding agreement entered into under the Act must be construed liberally in favor of tribes. While this already is a requirement of every ISDA contract (*see* 25 U.S.C. § 450(l)(c), sec. 1(a)(2)), it is sufficiently important that it should be restated in the Policy.

Specific Comments and Suggestions

I. *Direct Contract Support Costs (DCSC)*

The Policy formalizes the BIA's practice of calculating DCSC need as 15% of "current budgeted salary cost of IA 106(a)(1) programs, excluding fringe."¹ This language is vague. In many cases, BIA will not be able to point to an agency program budget at the time the program was transferred to a tribe. And even if BIA could identify such a budget, tribes have the authority under the ISDEAA to reallocate funds, and they may well spend more of their program funding on salaries than the BIA would have. Ak-Chin recommends that "current budgeted salary cost of IA 106(a)(1) programs" be revised to read "current tribally budgeted salary costs for IA programs transferred in the 106(a)(1) amount." Ak-Chin further recommends deleting the phrase "excluding fringe." Salaries, by definition, do not include fringe benefits, so the phrase is unnecessary. More importantly, it could be read by BIA awarding officials to mean that fringe costs are to be subtracted from salaries before multiplying by 15%. That has never been the BIA's practice, and it makes no sense. Striking the phrase will make the provision more clear and concise.

More broadly, Ak-Chin also urges BIA to increase DCSC funding to the levels necessary to meet actual tribal expenses. Like other employers, tribes have been hit hard by rising expenses, including but not limited to increasing employee health insurance premiums. To Ak-Chin's knowledge, BIA has never articulated a rationale for maintaining a 15% DCSC ratio other than saying that it would be too expensive to provide more DCSC funding to tribes. Given that the law requires CSC to be fully funded from an indefinite appropriation, however, that rationale is unconvincing in the face of demonstrable rising costs.

Finally, the Policy should acknowledge tribes' option to negotiate a lump sum for full DCSC funding in any given year. The ISDEAA requires full payment of DCSC, and if a tribe or tribal organization believes that 15% of salaries is not sufficient, they have the right to negotiate for a higher amount.

II. *Indirect CSC*

Ak-Chin supports the Policy's provision allowing calculation of indirect costs using the current year's rate or, if there is no current rate, the most recent rate for the previous three years. We also agree that tribes with no recent rate should negotiate lump sums for indirect-type costs. However, the Policy goes on to say that "[i]f the tribe does not initiate any of these options, IA

¹ Policy, § 8.

will not pay the tribe any indirect CSC.”² Ak-Chin strongly believes that this provision violates the ISDEAA, which requires payment of CSC regardless of whether a tribe initiates options set forth in an agency policy manual and specifically directs that the Secretary “shall add” such amounts to every contract. 25 U.S.C. 450j-1(g). Rather than purporting to allow the BIA to avoid payments that it is statutorily obligated to make, the Policy should require that, when a tribe does not have an indirect contract support costs rate that is less than 3 years old, BIA pay indirect costs either based upon the prior year’s amount or on the de minimis rate of 10% adopted in the Office of Management and Budget Supercircular.³

III. *Overpayment*

The Policy correctly includes a process for tribes to question overpayment determinations and show that they have not, in fact, been overpaid.⁴ Once the determination is final, however, the Policy requires tribes to repay the overage, which may often result in inefficiencies (for small overpayments) or hardships (for large overpayments). Ak-Chin believes that tribes should have the option to have the overpaid amount applied as an offset in the following year, as the draft IHS CSC policy does. Ak-Chin suggests that a sentence be added to Section 10 along these lines: “The Tribe may elect to either repay the overpaid amount or have BIA apply it as an offset to the following year’s CSC requirement.”

IV. *Handbook*

Ak-Chin understands that BIA is developing a Handbook that includes definitions, examples, templates, and other materials and that BIA has not included the Handbook in ongoing consultation because it does not consider the Handbook part of the Policy. Ak-Chin disagrees with this view, particularly in light of the *Ramah* litigation.⁵ Even if the Handbook were properly considered separate from the Policy, BIA should employ the same collaborative process with the Handbook that it did with the Policy. The Workgroup should be deeply involved in drafting and editing the Handbook, and BIA should also seek broader tribal review and comment, preferably through a formal consultation process.

Once the Policy and Handbook have been finalized and implemented, both documents must be readily available to tribal leaders and staff. Although the Indian Affairs Manual primarily governs internal BIA operations, several of the Handbook sections are meant to be

² Policy, § 9.

³ 2 C.F.R. § 200.414(f).

⁴ Policy, § 10.

⁵ The Third Partial Settlement Agreement approved by the Court in the *Ramah* litigation requires that “no rescission, amendment or change in the Interior CSC Policy shall be made without prior notice to all Tribes and tribal organizations, including a comment period of no less than three months and consultation in accordance with the Bureau of Indian Affairs Government-to-Government Consultation Policy with representatives of the National Congress of American Indians (“NCAI”) and the BIA CSC Workgroup established in subsection 5(B) of the Interior CSC Policy”. See *Ramah v Kempthorne*, No. 1:90-cv-00957-LH-KBM Doc. 1138-2 (filed May 19, 2008).

used by tribes. Others may be useful to both BIA and tribal staff, such as the templates for CSC needs calculations. Both the Policy and the Handbook should be easily accessible on the BIA website and not just buried in the Indian Affairs Manual.

V. *Reporting*

The Policy continues existing timelines for the annual CSC report to Congress, and establishes a process in which tribes will have the opportunity to comment on that report before it is finalized. Following the new IHS proposal on this topic, Ak-Chin recommends that the BIA also publish a separate CSC report for Tribes, with this separate report released to tribes even if the formal report to Congress is delayed.

VI. *Pre-award and Startup Costs*

The Policy should state clearly the process for negotiating pre-award and startup costs. In the past, agreements negotiated at the regional level have been overturned in the BIA central office by individuals lacking any on-the-ground experience in such matters. The Policy should clearly delegate the negotiation of these costs to regional and field personnel.

Ak-Chin is pleased to see that the BIA now acknowledges that requests for pre-award and startup costs are subject to the ISDA declination procedures. But, the pre-award and startup cost provisions reference an attachment of examples that was drafted by the agency without tribal input. BIA should allow tribes to provide input on this list. As currently drafted, the list is extremely narrow and fails to provide meaningful guidance for tribes.

Conclusion

Ak-Chin appreciates the opportunity to review and comment on BIA's draft CSC Policy.

Sincerely,



Robert Miguel, Chairman
Ak-Chin Indian Community Council